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No. 87-676

In the Supreme Court of the United States

OCTOBER TERM, 1987

MILLER AND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner challenges the court of appeals' holding that the Court of International Trade had no jurisdiction under 28 U.S.C. 1581(i) because petitioner bypassed the procedures that were available under 28 U.S.C. 1581(c) for raising its claims.

1. Petitioner imports pig iron from Brazil. On April 4, 1980, the International Trade Administration (ITA) of the United States Department of Commerce, having determined that Brazilian pig iron was being subsidized abroad, published an order, pursuant to 19 U.S.C. 1303, that imposed certain countervailing duties on the importation of such iron. On July 7, 1983, pursuant to 19 U.S.C. 1675, the ITA undertook a review of the countervailing duty order to determine the correct amount of the duty for the year 1981. On November 30, 1983, the ITA published its preliminary results and invited comments from interested parties. On March 16, 1984, the ITA published its final determination and directed respondent United States

Customs Service to assess countervailing duties in excess of the estimated duties that had already been paid on 1981 imports of Brazilian pig iron. Pet. App. 2a-3a.

Petitioner, though subject to the duties, did not participate in the ITA's Section 1675 review proceeding. After the ITA published its final results, however, petitioner challenged the ITA's determination in the United States Court of International Trade (CIT). Petitioner claimed that the final determination could not lawfully be enforced because the ITA did not complete its review within the period set forth in 19 U.S.C. 1504 and 1675. Petitioner invoked the CIT's jurisdiction under 28 U.S.C. 1581(i) and, subsequently, under 28 U.S.C. 1581(c) as well. Pet. App. 26a, 28a.

In 1984, the CIT ruled (Pet. App. 14a-22a) that petitioner could not invoke the court's jurisdiction under 28 U.S.C. 1581(c) because it had failed to participate in the administrative proceedings, a prerequisite to Section 1581(c) jurisdiction over a countervailing duty determination.[1] With respect to Section 1581(i), the court recognized that Section 1581(i) "may not be used to circumvent the specific requirements of jurisdiction under § 1581(a)-(h)" (Pet. App. 17a), but it reserved decision on whether petitioner could assert jurisdiction under Section 1581(i) based on the allegation that the ITA's actions were patently ultra vires because out of time (Pet. App. 21a). In 1986, the CIT held (*id.* at 9a-12a) that the ITA's final determination was not ultra vires because the time limits cited by petitioner were suspended until completion of the Section 1675 review. Accordingly, the court rejected petitioner's invocation of Section 1581(i) as a basis of jurisdiction and dismissed the action (Pet. App. 11a).

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[1] Section 1581(c) gives the CIT exclusive jurisdiction over civil actions commenced under 19 U.S.C. 1516a. Under 28 U.S.C. 2631(c), such an action may be commenced only by an "interested party who was a party to the proceeding in connection with which the matter arose."

The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1a-8a). The court agreed with the CIT that jurisdiction was unavailable under Section 1581(c) because petitioner failed to participate in the proceedings before the ITA (Pet. App. 7a, 8a). The court also held (*id.* at 8a) that petitioner could not assert jurisdiction under Section 1581(i), although, unlike the CIT, it did not address the merits of petitioner's ultra vires argument.

Section 1581(i)'s residual grant of jurisdiction, the court reasoned, may not be invoked to bypass the specific prerequisites for jurisdiction under another subsection of Section 1581 (Pet. App. 4a-5a). To invoke Section 1581(i), therefore, petitioner had to show that it could not have invoked Section 1581(c) or that the remedy under that subsection would have been "manifestly inadequate" (Pet. App. 5a). The court concluded that petitioner had failed to make either showing. The court ruled that petitioner could have raised its challenge to the timing of the ITA's review of 1981 duties by participating in the ITA proceeding and then challenging the countervailing duty determination under Section 1581(c) (Pet. App. 6a-7a). Moreover, that route to judicial review would have been wholly adequate, as shown by the fact that another importer of Brazilian pig iron used Section 1581(c) to raise precisely the same timing challenge as the one petitioner makes (Pet. App. 7a-8a). Because petitioner had bypassed the proper method of raising its claim, the court of appeals upheld the dismissal of petitioner's suit.

2. Notwithstanding petitioner's elaborate presentation of multiple questions for this Court's review, the only question properly presented is whether the CIT had jurisdiction under Section 1581(i) over petitioner's challenge to the ITA's countervailing duty determination. The court of appeals held that such jurisdiction is lacking. The decision is correct, for the reasons given by the court of appeals. It is not in conflict with any decision of any

other court of appeals, and no such conflict could arise, because of the Federal Circuit's exclusive jurisdiction in this area. Nor is the decision in conflict with any decision of this Court or any other decision of the Federal Circuit. Review by this Court is plainly unwarranted.

Petitioner challenges the countervailing duty determination that the ITA made under 19 U.S.C. 1675. Such a determination is expressly included among the decisions reviewable under Section 516A of the Tariff Act of 1930, 19 U.S.C. 1516a(a)(2)(B)(iii). Under 28 U.S.C. 1581(c), the CIT has "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." To bring such an action, a plaintiff must have been "a party to the proceeding in connection with which the matter arose"—in this case, the ITA's Section 1675 review proceeding (28 U.S.C. 2631(c)). Petitioner does not dispute that it failed to participate in the ITA proceeding and that jurisdiction under Section 1581(c) is therefore lacking.

Contrary to petitioner's argument (Pet. 6-16), jurisdiction under Section 1581(i) is also lacking. Section 1581(i) provides that, "[i]n addition to the jurisdiction conferred [on the CIT] by subsections (a)-(h)," the CIT "shall have exclusive jurisdiction" over actions arising out of laws that provide for "administration and enforcement with respect to the matters referred to in * * * subsections (a)-(h)" (28 U.S.C. 1581(i)(4)). As the court of appeals correctly ruled (Pet. App. 4a-5a), this grant of residual jurisdiction over certain tariff and trade matters is available only where the more specific jurisdictional grants in 28 U.S.C. 1581 (a)-(h) are not available. Otherwise, the residual jurisdiction could be used to circumvent the specific procedures that Congress established for judicial review under those other subsections. Of particular importance for this case, a successful invocation of Section 1581(i) would permit petitioner to bypass Section 1581(c)'s requirement of administrative participation as a prerequisite to judicial review.

Allowing such an end-run around Section 1581(c)'s exhaustion requirement would undermine the important (and common) congressional policy requiring that challenges to an administrative proceeding be presented initially to the administrative agency, thus affording the agency an opportunity to correct errors without the need for judicial intervention. Moreover, permitting petitioner to bypass Section 1581(c)'s mechanism for review of countervailing duty determinations under 19 U.S.C. 1516a would be directly contrary to Congress's intent in creating the Section 1581(i) residual jurisdiction:

> [I]t is the intent of the Committee that the Court of International Trade not permit subsection (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. Since subsection (i) merely confers jurisdiction on the court and does not create any new causes of action, [the bill] does not change the rights of judicial review which exist under section 516A.
>
> The Committee intends that any determination specified in section 516A of the Tariff Act of 1930 * * * [be] reviewable exclusively as provided in section 516A.

H.R. Rep. 96-1235, 96th Cong., 2d Sess. 48 (1980). Thus, as applied to cases like this one, Section 1581(i) was intended to furnish jurisdiction over an action "relating to an antidumping or countervailing duty proceeding [only] so long as the action does not involve a challenge to a determination" reviewable under Section 1581(c) (H.R. Rep. 96-1235, *supra*, at 48).[2] The court of appeals was

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[2] One illustration of when Section 1581(i) may be available is furnished by *United States Cane Sugar Refiners' Ass'n* v. *Block*, 683 F.2d

therefore entirely correct in holding that, if petitioner could have obtained review under Section 1581(c), it cannot assert jurisdiction under Section 1581(i).

As the court of appeals held (Pet. App. 5a-8a), petitioner could have obtained review under Section 1581(c), simply by participating in the ITA Section 1675 proceeding. Petitioner, which argues chiefly (Pet. 6-16) that it was not *required* to proceed under Section 1581(c), does not seriously contend otherwise. Nothing about the nature of petitioner's claim would have rendered the Section 1581(c) procedures inadequate, as petitioner could easily have presented to the ITA its claim that the ITA was acting ultra vires by exceeding prescribed statutory time limits.[3] Further, requiring presentation of claims like petitioner's well serves Section 1581(c)'s policy of affording an agency the initial opportunity to rule on challenges to its conduct: resolution of petitioner's challenge would require a construction of the statutes the agency is charged with administering, and the agency is owed deference in such matters. See, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 10. In short, petitioner could and should have

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399 (C.C.P.A. 1982). The court there found that the delay in proceeding under Section 1581(a) was too great, in light of the threat of immediate and irreparable harm to an industry and a substantial impact on the national economy. Accordingly, the court held that jurisdiction was available under Section 1581(i).

[3] Petitioner's reliance (Pet. 6-8) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), a case arising under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is misplaced. This Court there found general federal question jurisdiction over a claim of ultra vires agency action that could not have been raised in court in any other way. No bypassing of specific statutory mechanisms for judicial review was involved. Moreover, the plaintiffs had participated in the challenged administrative proceedings and raised the claim they subsequently brought to court.

raised its claim of untimely ITA action before the ITA and then, if judicial review was still necessary, sought review under Section 1581(c).

Petitioner makes some suggestions (Pet. 6-16) that the decision of the court of appeals conflicts with other decisions in the Federal Circuit. But an intra-circuit conflict, especially a conflict between a court of appeals and lower courts subject to its review, would not be a sufficient reason for this Court to grant certiorari. In any event, there is no such conflict. Petitioner has not pointed to any decision in the Federal Circuit or its predecessors that is contrary to the ruling below.[4] And the ruling is entirely consistent with and amply supported by the relevant precedent in that circuit. See, *e.g.*, *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982); *Royal Business Machines, Inc.* v. *United States*, 669 F.2d 692 (C.C.PA. 1982); *Pistachio Group of Ass'n of Food Indus.* v. *United States*, 638 F. Supp. 1340 (Ct. Int'l Trade 1986); *Wear Me Apparel Co.* v. *United States*, 636 F. Supp. 481 (Ct. Int'l Trade 1986).[5]

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[4] In particular, contrary to petitioner's suggestion (Pet. 13-16), the ruling below does not conflict with either *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254 (C.C.P.A.), cert. denied, 459 U.S. 943 (1982), or *UST, Inc.* v. *United States*, 648 F. Supp. 1 (Ct. Int'l Trade 1986), aff'd, 831 F.2d 1028 (Fed. Cir. 1987). In *Montgomery Ward*, the court held that a settlement agreement between the United States and importers was not reviewable under either Section 1581(c) or Section 1581(i) because Congress did not intend to make settlement agreements reviewable (673 F.2d at 1260-1261). In *UST, Inc.*, the court found Section 1581(i) jurisdiction over plaintiffs' request for a writ of mandamus to compel the ITA to complete a Section 1675 proceeding in which plaintiffs were participating. Because the proceeding was not yet complete, the mandamus request could not have been heard under Section 1581(c).

[5] Petitioner also argues the merits of its timeliness challenge to the ITA's Section 1675 proceeding (Pet. 17-28). This argument is not

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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properly before the Court. The court of appeals did not address it, but instead correctly concluded that there was no jurisdiction to consider the argument because petitioner bypassed the proper procedure for raising it. To the extent the legal issue is of any importance, it can and will be raised in the future. Here, we simply note our agreement with the decisions that have addressed this question, all of which have rejected petitioner's position. Pet. App. 10a-11a; *Nissan Motor Corp.* v. *United States,* 651 F. Supp. 1450 (Ct. Int'l Trade 1986); *UST, Inc.* v. *United States, supra; American Permac, Inc.* v. *United States,* 642 F. Supp. 1187 (Ct. Int'l Trade 1986); *Philipp Bros.* v. *United States,* 630 F. Supp. 1317 (Ct. Int'l Trade 1986), appeal dismissed, No. 86-1122 (Fed. Cir. July 18, 1986).

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